Supreme Court, U.S.
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No. 91-1358

In The

Supreme Court of the United States

October Term, 1991

JOSEPH SCHWARTZ,

Petitioner,

vs.

CITY OF FLINT,

Respondent.

Petition For Writ Of Certiorari To The Michigan Court Of Appeals

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's response to the Petition for Writ of Certiorari gives reverberant emphasis to the need for grant of the writ.

1. The City, with more audacity than foundation, contends that "the final and authoritative determination of the type and intensity of development legally permitted on subject property," pursuant to this Court's test in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986), was fixed by the Flint City Council in 1971 (Br. p. 5)! That action, however, was found more than a decade ago to be unconstitutional and invalid, a taking of Petitioner's property "without just compensation, contrary to the Federal and State Constitutions" and its enforcement was authoritatively enjoined, *Schwartz v. City of Flint*, 92 Mich. App. 495, 503, 539, 540 (1979), *lv to app den*, 408 Mich. 905 (1980). Much later the Michigan Supreme Court remanded the cause to the trial court to "allow for a determination of reasonableness" of the use of the property proposed by Petitioner, *Schwartz v. City of Flint*, 426 Mich. 295, 330 (1986).

The trial court ultimately entered a judgment which found the proposed use "fair and reasonable" and declared Petitioner "free to develop" the property as indicated (Pet App 14). The former action was "settled" by that judgment. Only with entry of the consent judgment had the City "arrived at a definitive position" regarding the application of the regulations to the property at issue, *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 193 (1985). Until then a "legally permitted" use had not been determined and Petitioner had

no justiciable federal cause of action to assert. *Res judicata* under state law cannot preclude an unripened, nonjusticiable federal claim.[1]

2. Respondent's second contention is that "Petitioner never sought to recover compensation through an inverse condemnation action" (Br, p. 6), although such a remedy is available under Michigan law. This lawsuit was filed precisely for such purpose. Once the contours of Petitioner's injury had been fixed, the complaint, quoted at p. 4 of the Petition, sought relief from inverse condemnation, for an unconstitutional "taking" and for deprivation of Petitioner's rights under federal and state due process principles. *Cf. Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991). The challenged decision of the Court of Appeals did not question that such a suit against a municipality may properly be filed in a Michigan circuit court; its imposition of state-formulated *res judicata* doctrine itself rendered the state compensation remedy "inadequate," *cf. Samaad v. City of Dallas*, 940 F.2d 925, 933-934 (5th Cir. 1991). But regardless of what procedural rules the state may prescribe, federal rights may not be impaired "under the name of procedure," *Atlantic Coast Line Railroad Co. v. Burnette*, 239 U.S. 199, 201 (1915); 42 U.S.C. §1983 offers "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the

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[1] In the recent argument in *Lucas v. South Carolina Coastal Council*, No. 91-453, echoing settled law, Justice White is reported to have noted that the action of a state court "doesn't settle ripeness for us." 60 U.S.L.W. 3610 (3-10-92).

Nation." *Mitchum v. Foster,* 407 U.S. 225, 239 (1972); *Felder v. Casey,* 487 U.S. 131, 139 (1988).

3. Respondent questions certain recitals of fact in the Petition which, we believe, are fully supported by the record. At most, its cavils suggest that Respondent's motion for summary disposition without trial should never have been granted; the issue is not relevant here. No more germane is *Christy v. Servitto,* 699 F.Supp. 618 (E.D. Mich. 1988), invoked by Respondent (Br. p. 8). The district court concluded that the operator of an adult entertainment store failed to prove infringement of her First Amendment rights because of denial of a building permit. That conclusion was affirmed, 932 F.2d 502 (6th Cir. 1991). The district court also considered the plaintiff's claim for damages for alleged denial of procedural due process. It found that such a claim "could have been raised and resolved" in the prior case and accordingly was barred by *res judicata* (699 F. Supp. at 655). Schwartz made no claim for damages in the prior litigation since no cause of action for damages had matured and was susceptible to assertion. *Christy* teaches precisely the opposite of what Respondent contends.

4. The Court's pending consideration in No. 91-453 of *Lucas v. South Carolina Coastal Council,* (Sup. Ct. S. Car., 1991), 404 S.E.2d 895 underlines the contemporary importance of regulatory taking issues. Assuring property owners no less constitutional protection in state courts than in district courts will help to reduce glutted dockets in the federal system.

RELIEF

We again pray grant of the writ.

Respectfully submitted,

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